Supreme Court, U.S.
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No. 94-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

LEROY A. PETERSON AND ARDIS PETERSON,

Petitioners,

v.

RICHARD ALLAN FISHER AND TRAILL COUNTY, A POLITICAL SUBDIVISION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eighth Amendment's deliberate indifference standard applies to medical care claims of pretrial detainees.

Whether the conclusion that Sheriff Fisher's conduct did not constitute deliberate indifference, as defined in *Farmer v. Brennan,* is dispositive of Peterson's claims that Fisher's conduct constituted reckless or grossly negligent conduct, or willful or wanton misconduct under state law.

PARTIES BELOW

All parties to the proceedings in the court of appeals are named in the caption of this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 17

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bell v. Wolfish, 441 U.S. 520 (1979) 8, 11, 12, 13, 14

Boswell v. Sherburne County, 849 F.2d 1117 (8th Cir. 1988).....9, 10

Canton v. Harris, 489 U.S. 378 (1989) 8

Caton v. Maze, 995 F.2d 881 (8th Cir. 1993) 15

Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987).....10, 13

Davis v. Hall, 992 F.2d 151 (8th Cir. 1993) 10

Ervin v. Busby, 992 F.2d 147 (8th Cir. 1993)..... 10

Estelle v. Gamble, 429 U.S. 97 (1976) 8, 9

Farmer v. Brennan, 114 S.Ct. 1970 (1994) 7, 8, 10, 14, 15, 17

Foulks v. Cole County, Mo., 991 F.2d 454 (8th Cir. 1993).....9, 10

Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989)..... 9

Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984)..... 13

McCuen v. Polk County, Iowa, 893 F.2d 172 (8th Cir. 1990)..... 15

Reich v. Conagra, 987 F.2d 1357 (8th Cir. 1993)..... 15

Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983).....8, 13, 14

Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984)..... 13

Wilson v. Seiter, 501 U.S. 294 (1991) 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Model Civil Jury Instructions for the District Courts of the Eighth Circuit (Sept. 1992) 11

Model Instruction 4.02 ..... 11, 12

Model Instruction 4.03 12

Model Instruction 4.04 ..... 11, 12

N.D.A.C. § 10-05-06-02 6

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(a)(3) 7

42 U.S.C. § 1983 ..... 3, 7, 11, 14, 17

No. 94-___

In The

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LEROY A. PETERSON AND ARDIS PETERSON,

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v.

RICHARD ALLAN FISHER AND TRAILL COUNTY, A POLITICAL SUBDIVISION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Leroy A. Peterson and Ardis Peterson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on July 12, 1994.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is unpublished. The decision is cited at 29 F.3d 628 and the opinion is reproduced in the Appendix ("App.") at App. 1 to App. 3.

The Eighth Circuit's unpublished order denying Peterson's petition for rehearing is reproduced at App. 4. The opinion of the United States District Court for the District of North Dakota was also not reported but it is reproduced at App. 5 to App. 22.

JURISDICTION

The decision of the court of appeals was entered on July 12, 1994. Its order denying petitioners' timely request for rehearing and suggestion for rehearing *en banc* was filed on August 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions or statutes are pertinent to this petition:

U.S. CONST. amend. VIII – Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

U.S. CONST. amend. XIV, § 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any

state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 – Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

An intoxicated Leroy A. Peterson ("Peterson") was arrested for non-payment of child support on Friday evening and placed in the detoxification cell of the Traill county jail, in Hillsboro, North Dakota. On Saturday morning, he was transferred to the "bull pen" area of the jail, where he remained with other inmates until Monday. Peterson was sick all weekend. The behaviors exhibited by Peterson were compatible with serious withdrawal symptoms and delirium tremens. Alcohol withdrawal syndromes are extremely serious. There is a significant risk that an individual suffering from withdrawal will seriously injure himself in his extremely confused and delusional mental state.

At least by Sunday evening, other inmates reported to a jailer that Peterson was disoriented and "seeing things." At 7:15 p.m., the jailer telephoned Sheriff Richard Allan Fisher ("Fisher") to report. Fisher advised the

jailer to keep an eye on Peterson and contact a physician Monday morning. At midnight, information concerning Peterson was given to another jailer who then went on duty. This jailer observed Peterson's disorientation, an incident involving an hallucination and other symptoms of alcohol withdrawal. At 3:30 a.m., he, like his predecessor, telephoned Fisher to report. Fisher also advised this jailer to keep an eye on Peterson and to arrange for a physician to examine Peterson later that morning. Unfortunately, before the arrangements were made, Peterson fell in the jail and suffered a serious head injury. The fall occurred at approximately 9:25 a.m. on Monday.

The clinic in Hillsboro is only two blocks from the jail and the hospital is only three blocks away. A doctor is available on a 24 hour basis through the hospital and there is always some health care professional at the hospital or clinic that Fisher and his jailers could contact on a 24 hour a day basis. There is no evidence and there has been no suggestion that appropriate health care was not reasonably available for Peterson from Sunday at 7:15 p.m. to Monday at 9:25 a.m.. The decisions which Fisher made about medical treatment for Peterson were not made under any pressure. There was adequate time to consult with a physician or other health care professional and make arrangements for medical care before Peterson was hurt. Peterson's injuries were entirely preventable.

Fisher was well acquainted with Peterson and knew he was an alcoholic. He had taken Peterson to the Jamestown state hospital on two or three prior occasions for treatment of his alcoholism. In addition, less than six months earlier, while confined in the same jail, Peterson suffered a seizure due to alcohol withdrawal. He was

injured on that occasion as well and transported to the Hillsboro hospital by ambulance. A statement by the jailer on duty Sunday evening to another one of the inmates to the effect that this had happened before and they knew what was going on with Peterson was indeed prophetic. In fact, he was the same jailer who was on duty when Peterson was hurt previously. In light of their knowledge of Peterson's alcoholism and his previous difficulties with withdrawal symptoms at the Traill County Jail, Peterson should have received appropriate medical care at the time of admission or shortly thereafter. Fisher and his jailers certainly should have been more acutely sensitive to Peterson's condition.

The information about Peterson's condition that was conveyed to Fisher Sunday evening was interpreted by Fisher as alcohol withdrawal. One may infer that Fisher recognized the condition as a medical problem because he decided that Peterson's condition warranted a medical evaluation. Moreover, one may infer that he was aware of a risk of harm to Peterson because he concluded that Peterson should be watched closely to "make sure he can't hurt himself".

In connection with his decision to delay medical care, Fisher, at no time, consulted a physician or any other health care professional and he never instructed his jailers to do so. His only explanation for delaying medical treatment was that he did not feel it was a medical emergency. By the same token, Fisher acknowledged that he was not a doctor, had no training concerning the DTs, and was incapable of recognizing the seriousness of alcohol withdrawal. In fact, he would defer to a doctor for a

detemination of whether immediate medical care is required for alcohol withdrawal.

Any reasonable jailer would have recognized Peterson's problem and made immediate arrangements for medical care. In fact, immediate arrangements for medical care to inmates suffering from alcohol withdrawal was mandated by the Traill County Jail's Policy and Procedure Manual. Fisher had been sheriff of Traill County for 16 years and he had personally approved the jail manual including this particular provision more than seven years prior to this incident. Under all of these facts and circumstances, one may infer that Fisher was aware of an obvious risk of harm to an inmate suffering from alcohol withdrawal if immediate arrangements for a medical evaluation of such inmate are not made.

According to Plaintiffs' experts, the events recorded in the jail log create a picture of archaic, barbaric and inexcusable conditions at the Traill County Jail. Fisher had no training concerning delirium tremens (the DTs) and it was outrageous for him to make a decision regarding a delay in medical care without competent medical advice. This is particularly true where the jail's manual mandated immediate care.

The manual aside, Fisher still had no discretion to make a decision to delay medical care. Even if one mistakenly assumed that Peterson's condition was not a medical emergency and did not require immediate care, nonemergency care should have been administered only as directed by the Traill County Jail's health care administrator. N.D.A.C. § 10-05-06-02. The health care administrator, however, was not consulted.

District Court Proceedings. On June 1, 1992, Peterson instituted this action, invoking the district court's jurisdiction under 28 U.S.C. § 1343(a)(3) which grants district courts original jurisdiction of any civil action involving 42 U.S.C. § 1983.

Upon a motion for summary judgment, Peterson's claims against Fisher for delaying medical treatment of his alcohol withdrawal symptoms were dismissed by the district court. Peterson's § 1983 claim was dismissed on the basis that Fisher was entitled to qualified immunity and that Fisher's conduct could not be reasonably characterized as deliberately indifferent. Peterson's state law claims of recklessness, gross negligence and willful or wanton misconduct were also dismissed by summary judgment for essentially the same reason, i.e. that no reasonable jury could characterize Fisher's acts or omissions as such. Following a dismissal of Peterson's pendent state law claim of negligence, pursuant to a stipulation of the parties, a judgment was entered dismissing the action.

The Eighth Circuit's Decision. In a per curiam opinion, the United States Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment on the primary basis that summary judgment in this case is consistent with this Court's pronouncement in *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994) that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." Petitioners' request for a

rehearing and suggestion for rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

Peterson was a pretrial detainee, not a convicted prisoner. As such, his constitutional right to medical care is derived from the due process clause of the Fourteenth Amendment, not the Eighth Amendment's prohibition of cruel and unusual punishments. *Bell v. Wolfish,* 441 U.S. 520 (1979); and *Revere v. Massachusetts General Hospital,* 463 U.S. 239 (1983). The important constitutional issue of what standard applies to medical claims of pretrial detainees was raised in this appeal, but not directly addressed in the eighth circuit's opinion. By clear implication, the eighth circuit applied the Eighth Amendment's "deliberate indifference" standard to Peterson's § 1983 claim. The "deliberate indifference" standard was adopted for convicted prisoners in *Estelle v. Gamble,* 429 U.S. 97 (1976) and was recently defined by this Court as requiring a showing that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety". *Farmer v. Brennan,* 114 S.Ct. 1970, 1979 (1994).

In *Revere v. Massachusetts General Hospital,* 463 U.S. 239, 243-245 (1983), this court reserved decision on the issue of whether medical claims of pretrial detainees may be governed by some test other than deliberate indifference. In a footnote in *Canton v. Harris,* 489 U.S. 378, 388

n.8 (1989), this Court acknowledged that the issue remained open but it was unnecessary to resolve the issue in that case. It is still an open issue that now takes on greater significance in light of this Court's recent definition of deliberate indifference. The issue may be finally resolved in this case. It has been clearly and directly raised as an issue in this petition and in all proceedings in the court of appeals and district court below.

In an earlier decision, the eighth circuit had also acknowledged that there was an open question as to whether the Fourteenth Amendment provides pretrial detainees with a greater degree of protection against denial of medical care than the "deliberate indifference" standard for convicted prisoners established in *Estelle v. Gamble,* 429 U.S. 97 (1976). *Boswell v. Sherburne County,* 849 F.2d 1117 (8th Cir. 1988). Subsequently, another panel of the eighth circuit stated: "The deliberate indifference standard is used in assessing claims of medical deprivation to measure the rights of convicted prisoners to be free of cruel and unusual punishment. Because pretrial detainees are entitled to be free of all but incidental punishment, and in light of their inability to elect medical treatment and supplies as can unconfined defendants, a more stringent standard should be appropriate in assessing their claims of inadequate medical care." *Johnson-El v. Schoemehl,* 878 F.2d 1043, 1055, n.8 (8th Cir. 1989). However, no panel of the eighth circuit has enunciated any different standard for pretrial detainees. On at least three occasions in 1993, panels of the eighth circuit declined to do so. See *Foulks v. Cole County, Mo.,* 991 F.2d 454, 457 n.4

(8th Cir. 1993); *Ervin v. Busby*, 992 F.2d 147 (8th Cir. 1993); and *Davis v. Hall*, 992 F.2d 151 (8th Cir. 1993).

In *Boswell v. Sherburne County*, 849 F.2d 1117 (8th Cir. 1988), the panel felt it was both unnecessary and unwise to enunciate a different standard because it was not essential to a resolution of that case, and because the issue had provoked varied responses in other circuits. Thereafter, other panels in the eighth circuit apparently continued to feel it unnecessary to enunciate a different standard. In *Davis v. Hall*, 992 F.2d 151 (8th Cir. 1993), the eighth circuit found that the pretrial detainee's claim would fail even if it applied the reasonable care standard adopted in the fifth circuit. See *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987). And, in *Foulks v. Cole County, Mo.*, 991 F.2d 454, 457 n.4 (8th Cir. 1993), the panel found, as it did in *Boswell v. Sherburne County*, 849 F.2d 1117 (8th Cir. 1988), that a sufficient claim of deliberate indifference was alleged to withstand summary judgment. For the same reason, I felt, and I continue to feel, that it was unnecessary to enunciate a different standard for pretrial detainees in this case. I urged the eighth circuit to find that even under the definition of deliberate indifference enunciated in *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994), a sufficient claim was alleged and supported by the record to withstand summary judgment in this case. The eighth circuit obviously disagreed, but in doing so, it did not specifically address the issue of whether some standard less stringent than deliberate indifference governed medical care claims of pretrial detainees.

By implication, the eighth circuit now appears to have decided that medical care claims of pretrial

detainees are governed by the same standard as convicted prisoners. This issue of federal law, however, is too important to be decided by implication and the issue ought to be settled by this Court. As noted above, the issue has provoked a variety of responses in the circuits and for these reasons alone, this petition should be granted.

As this Court has noted, the deprivation of medical care to an individual prisoner is properly considered a "condition of confinement". *Wilson v. Seiter,* 501 U.S. 294, 299 n.1 (1991). As such, it is appropriate for this court to consider whether such claims should be treated differently from other "condition of confinement" cases brought pursuant to § 1983. In this context, it is interesting to consider the Model Civil Jury Instructions for the District Courts of the Eighth Circuit (Sept. 1992). Instruction 4.03 represents the recommended instruction for "conditions of confinement" cases involving pretrial detainees. It provides, in part, that one of the elements that a Plaintiff must prove in such a case is: "*Second,* under all circumstances defendant's acts were not reasonably related to [here, describe the purpose for which the action was taken such as "maintain order" or "insure that no illicit drugs or weapons reach inmates"], or were excessive beyond that necessary to [here describe the purpose for which the action was taken such as "maintain order"]." This is essentially a reasonable care standard that was derived from *Bell v. Wolfish,* 441 U.S. 520 (1979). Upon reviewing Instruction 4.02 (Use of force – 4th Amendment pretrial detainees), and Instruction 4.04 (Denial of medical care – convicted prisoners) and the

Committee Comments relating to those Model Instructions, it appeared that Instruction 4.03 appropriately modified would be a proper instruction for cases involving medical care to pretrial detainees. In fact, the comment to Instruction 4.04 included the statement that: "This Committee does not know what standard will be required when dealing with medical claims of pretrial detainees, but recommends the use of an instruction which requires corrections officials to use 'reasonable' care in dealing with such cases." The Committee Comments then refer to Instruction 4.02 and the comments to 4.02 refer to 4.03 for condition of confinement cases involving pretrial detainees.

The eighth circuit's Model Instruction 4.03 conforms to the standards set out in *Bell v. Wolfish,* 441 U.S. 520 (1979). In that case, this Court stated: "In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee." *Bell v. Wolfish,* 441 U.S. 520, 535 (1979). This Court went on to say that: "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment". Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a Court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Bell v. Wolfish,* 441 U.S. 520, 539 (1979).

There is no reason to distinguish a pretrial detainee's claim that he was denied medical care from any other claim involving some other condition of that pretrial detainee's confinement. There is, on the other hand, constitutional justification for recognizing the distinct status of a pretrial detainee as compared to a convicted prisoner. The prohibitions of the Eighth Amendment simply do not apply to pretrial detainees and the Supreme Judicial Court of Massachusetts' holding to the contrary was reversed in *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). As a corollary, the "deliberate indifference" standard, based, as it is, on the Eighth Amendment's proscriptions, does not govern claims of pretrial detainees.

Consistent with *Bell v. Wolfish*, 441 U.S. 520 (1979), some circuits have held or made statements which support an instruction that is similar to the Eighth Circuit's model instruction 4.03 in the context of medical care claims asserted by pretrial detainees. For example, in *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987), the fifth circuit held: "pretrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." Similarly, in *Whisenant v. Yuam*, 739 F.2d 160, 164 (4th Cir. 1984), the court stated that a pretrial detainee is entitled to protection from adverse treatment if he can prove punitive intent or that a restriction or condition of confinement is not reasonably related to a legitimate goal. Finally, citing *Bell v. Wolfish*, 441 U.S. 520 (1979), the seventh circuit in *Matzker v. Herr*, 748 F.2d, 1142, 1147 (7th Cir. 1984) stated: "a pretrial detainee's due process right to be free from punishment is violated when a jailer fails

to promptly and reasonably procure competent medical aid for pretrial detainee who suffers a serious illness or injury while confined." On the other hand, other circuits have applied the deliberate indifference standard. Even the fourth and seventh circuits have applied a deliberate indifference standard in later decisions.

In determining whether there is justification for withholding medical treatment to a pretrial detainee, the focus should be on the existence of overriding state interests. In the absence of an overriding state interest, all medical needs of pretrial detainees should be promptly attended and, in assessing the state's interests, this Court, in *Bell v. Wolfish*, 441 U.S. 520 (1979), identified only two legitimate interests, namely: assuring the detainee's presence at trial and maintaining security at the institution. In this case, there is no indication that the decision to delay Peterson's medical treatment was based on either.

As recent as September, 1992, the Committee and Subcommittee on Model Jury Instructions for the Eighth Circuit consisting of nine District Judges, three U.S. Magistrates and seven attorneys recommended a jury instruction which required prison officials to use reasonable care in dealing with medical care claims of pretrial detainees. No decision in the eighth circuit or of this Court, including the *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994) decision, compels a different recommendation. In its Memorandum and Order, the district court felt constrained to apply the deliberate indifference standard to Peterson's § 1983 claim. See App. 11. The eighth circuit affirmed. This cannot be reconciled with this Court's decision in *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983). The deliberate indifference standard is an

eighth amendment standard and does not apply to claims of pretrial detainees.

It is also appropriate for this Court to consider the court of appeals' failure to specifically address petitioners' state law claims of recklessness, gross negligence and willful or wanton misconduct. As is apparent from this Court's opinion in *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994), deliberate indifference is not equivalent to those less stringent standards of care. The eighth circuit, and the district court to a lesser degree, however, implicitly found that if the deliberate indifference standard was not met, petitioners could not satisfy these other standards.

It is difficult to understand the opinions of the district court and the eighth circuit as one considers the standard of review upon motions for summary judgment and appeals from orders granting summary judgment. It has been well settled in the eighth circuit that the court of appeals reviews a district court's grant of summary judgment de novo under the same strict standard as the district court. This meant that the court of appeals, like the district court, was required to view all of the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences to be drawn therefrom. Applying this standard, summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Reich v. Conagra*, 987 F.2d 1357 (8th Cir. 1993); *McCuen v. Polk County, Iowa*, 893 F.2d 172 (8th Cir. 1990); and *Caton v. Maze*, 995 F.2d 881 (8th Cir. 1993). There is no indication that the eighth circuit reviewed the district court's grant of summary judgment

de novo or that it viewed the evidence in the light most favorable to the petitioners as it was required to do. This reason, alone, is probably insufficient to grant this petition but it does constitute an appropriate consideration as this Court makes a decision as to whether it will exercise its power of supervision.

There are also good policy reasons for granting this petition, particularly in the context of the facts of this case. Alcoholism is a serious and oft times fatal illness. It is also characteristically accompanied by significant denial. While 10% of the general population is affected by alcoholism, one of petitioners' experts opined that 30 to 50% of prisoners in this country's correctional institutions are alcohol or chemically dependent. It is therefore imperative that jailers and those responsible for the health care of prisoners be thoroughly aware of the signs and symptoms of withdrawal.

Physicians and other health care personnel are best equipped to make informed decisions about medical treatment. This is particularly true in the context of serious illnesses such as alcoholism. Any corrections officer or jail administrator, be it a sheriff or jailer, who makes such a decision for an inmate, be it a convicted prisoner or a pretrial detainee, without the benefit of consulting an appropriate health care professional, when there is adequate time and a reasonable opportunity to do so, should be held to the same standard as a physician or at least charged with the knowledge that a consultation would have disclosed. Every corrections officer should be charged with the knowledge that an uninformed decision about delaying medical treatment to an inmate inherently

creates a substantial risk of harm to the inmate if competent medical advice is reasonably available and not solicited. This should satisfy the *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994), definition of deliberate indifference in the context of all claims by inmates, convicted prisoners and pretrial detainees alike, where the basic right to medical care is involved.

The decisions which Fisher made about medical treatment for Peterson were not made under any pressure. There was adequate time to consult with a physician or other health care professional and still avoid the harm that befell Peterson. Petitioners have a legitimate and supportable claim under § 1983 that should not have been dismissed by summary judgment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 9, 1994

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3654

Leroy A. Peterson; Ardis Peterson, Plaintiffs-Appellants, v. Richard Allan Fisher; Traill County, a political subdivision, Defendants-Appellees.	*	Appeal from the United States District Court for the District of North Dakota. [UNPUBLISHED]

Submitted: June 15, 1994

Filed: July 12, 1994

Before BOWMAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

An intoxicated Leroy A. Peterson was arrested for non-payment of child support on Friday evening and placed in the detoxification cell of the Traill County jail. On Saturday morning, he was transferred to the "bull pen" area of the jail, where he remained with other

inmates until Monday. Peterson was sick all weekend. By Sunday night, other inmates reported to jailers that Peterson was disoriented and "seeing things." The jail log reflects that two different jailers talked to Peterson at 7:15 p.m. and 3:30 a.m., concluded that he was aware of his surroundings and in possession of his faculties, and telephoned Sheriff Richard Allen [sic] Fisher at his home to report. Fisher and the jailers concluded there was no medical emergency. Fisher instructed the jailers to check Peterson's cell every half hour all night, which they did, and to arrange for a physician to examine Peterson Monday morning. Unfortunately, before the medical exam could be scheduled Monday morning, Peterson fell in the jail and suffered a serious head injury.

Peterson and his wife commenced this action, alleging that Fisher's deliberate indifference to Peterson's serious medical need for alcohol withdrawal treatment violated 42 U.S.C. § 1983, and alleging pendent state law claims against Fisher and Traill County. After the parties completed discovery, the district court granted Fisher summary judgment, concluding (i) "any assertion that Fisher was acting in a manner that was deliberately indifferent to [Peterson's] medical needs flies in the face of reality," and (ii) no reasonable jury could find that Fisher's conduct "constitute[d] reckless or grossly negligent conduct, or willful or wanton misconduct," the relevant standard for public employee liability under N.D. Cent. Code § 32-12.1-04(3). The Petersons then dismissed their claims against Traill County and appealed this summary judgment ruling.

On appeal, the Petersons argue that genuine issues of material fact exist that preclude summary judgment dismissing their § 1983 and state law claims against Sheriff Fisher. After careful review of the record, we conclude that the district court properly identified disputed fact issues, determined that those issues are not material, and granted Fisher's motion for summary judgment. In particular, summary judgment in this case is consistent with the Supreme Court's recent pronouncement that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 114 S. Ct. 1970, 1979 (1994). Accordingly, the judgment of the district court is affirmed for the reasons stated in the district court's Memorandum and Order dated September 27, 1993. *See* 8th Cir. Rule 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Court of Appeals Order Denying Rehearing
[August 13, 1994]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3654NDF

Leroy A. Peterson, et al., Appellants, v. Richard Allan Fisher, et al., Appellees.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 15, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Leroy A. Peterson and Ardis Peterson, Plaintiffs, -vs- Richard Allan Fisher and Traill County, a political subdivision, Defendants.	)	Civil No. A2-92-91

MEMORANDUM AND ORDER

(Filed Sep. 27, 1993)

This action by the plaintiffs, Leroy A. Peterson and Ardis Peterson, against the defendants, Richard Allan Fisher, former sheriff of Traill County, and Traill County, a political subdivision, is based upon federal question jurisdiction. Plaintiff Leroy Peterson allegedly was severely injured when he apparently fell and suffered head injuries while a pretrial detainee at the Traill County Jail. Plaintiffs claim that the defendants acted improperly in failing, for whatever reason, to respond to severe alcohol withdrawal symptoms and delirium tremens experienced by Leroy, which symptoms allegedly precipitated the fall. In addition to claiming that Fisher deprived Leroy Peterson of constitutional rights under color of law, plaintiffs allege pendent state law negligence claims against both Fisher and Traill County. Before the court is defendant's motion for summary judgment (docket #24). Plaintiffs resist the motion (docket #27).

Facts

On April 13, 1990, plaintiff Leroy A. Peterson ("Leroy") was brought to the Traill County jail pursuant to a warrant of attachment for failure to pay child support. Leroy was then under the influence of alcohol and resisted arrest by Deputy Ray Weber. Following booking procedures, Leroy was placed in the county jail's detoxification cell. On Saturday, April 14, 1990, Leroy was placed in the general cell area. County jailers noticed nothing unusual in Leroy's behavior on Saturday, April 14.[1]

At 2:15 p.m. on Sunday, April 15, 1990, Leroy placed a call to his home under the supervision of jailer Mike Chamberlain. At approximately 7:15 p.m. Sunday evening, inmate Chuck Syvertson reported to jailer Daryl Berg that Leroy was becoming disoriented.[2] Berg examined Leroy and satisfied himself that Leroy was aware of

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[1] Plaintiffs dispute the defendants' assertion, stating that Leroy was suffering from alcohol withdrawal symptoms and delirium tremens during the entire period of confinement, and that the defendants knew or should have known this fact, but simply failed to arrange necessary medical care.

[2] Factual disputes exist with regard to the actions of inmates who were housed at Traill County at the time of Leroy's arrest. As part of their "Statement of Material Facts Not in Dispute," defendants assert that, during the week prior to Leroy's incarceration, inmates at the jail had engaged in riot activities. Further, defendants contend that, due to a previous jail break and the inmates' riot activities, the jailers and Fisher were particularly wary of the activities of the inmates involved. The jailers were apparently instructed by Fisher to report all unusual activities of any inmate. Plaintiffs dispute the assertion that inmate Syvertson was involved in any of the riot activities and contend that Fisher's decision to delay medical treatment

his surroundings and had his faculties about him. Nonetheless, Berg phoned Sheriff Richard Allan Fisher ("Fisher") at home to report Syvertson's statement and Berg's own opinion that no medical emergency existed. Fisher and Berg determined to keep a watchful eye on Leroy for the rest of the night.

Berg later performed cell checks at 7:30, 7:48, 8:00, 8:15, 8:40, 9:00, 9:15, 10:00, 10:15, 10:30, 11:00, and 11:30 p.m., and at 12:00 midnight,[3] noting nothing unusual in Leroy's behavior. Berg's shift ended at midnight, at which time jailer Mike Chamberlain started his shift with a midnight cell check. Chamberlain later performed cell checks at 1:00, 2:00, 2:20, 2:45, 3:10, 3:30, 4:00, 4:30, 5:00, 5:30, 6:00, 7:00, and 8:00 a.m. At the 2:20 a.m. cell check, Chamberlain noted that Leroy's hands were shaking after he requested a cigarette from Chamberlain. At this time, other prisoners had apparently reported that Leroy was disoriented, but Chamberlain's cell check did not confirm this. The 2:45 a.m. cell check revealed Leroy pacing and unable to sleep. Other inmates then reported to Chamberlain that Leroy was hallucinating. Again, Chamberlain's personal observations did not reveal this. At 3:30 a.m., inmates Syvertson and Frank Harris reported that Leroy thought he was at home and was calling out for his wife;

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for Leroy was based neither on the riot activities nor the alleged jail break.

[3] Plaintiffs note that references by defendants to cell checks at particular times are substantiated by the jail logs. However, the plaintiffs dispute some of defendants' contentions as to what occurred at those times.

again these reports were not substantiated by Chamberlain during the cell check. Chamberlain then called Fisher at home to inform him of the inmates' assertions regarding Leroy. Chamberlain opined that no medical emergency existed and he and Fisher agreed that Leroy should be watched closely and examined by a physician in the morning. Chamberlain performed cell checks every half hour until Leroy fell asleep between 5:00 and 5:30 a.m. Chamberlain then performed cell checks every hour until the end of his shift at 8:00 a.m. Monday, April 16, 1990.

Jailer Nola Stenerson came on duty at 8:00 a.m. Monday, April 16, 1990. She phoned the Hillsboro Hospital at 9:10 a.m. to set up an appointment for a physician to examine Leroy. She was informed that the physician was unavailable and that the hospital would call back at 9:30. At 9:25 a.m., Stenerson heard a loud noise and, with Chamberlain, proceeded to the cell area, where they found plaintiff lying on his back and bleeding from a head injury. An ambulance was summoned and Leroy was taken to Hillsboro Hospital and later transferred to a Fargo hospital.

Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is improper if the court finds a genuine issue of material fact; however, the mere existence of

some alleged factual dispute will not defeat an otherwise properly supported motion. *Vacca v. Viacom Broadcasting of Mo., Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989). "Summary judgment 'should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy.' " *Id.* (quoting *Snell v. United States*, 680 F.2d 545, 547 (8th Cir.), *cert. denied*, 459 U.S. 989 (1982)).

The § 1983 Claim Against Fisher

In count one of their complaint, plaintiffs allege that defendant Fisher, under color of state law, deprived Leroy of rights, privileges and immunities secured by the fourteenth amendment to the United States Constitution, including the right to medical care, the right to be free from punishment, and the right to protection of health and safety. Further, plaintiffs contend that, in delaying the provision of medical care to Leroy, Fisher was deliberately indifferent to Leroy's medical necessities.

Defendant Fisher denies plaintiffs' assertions. In their brief in support of the motion for summary judgment, the defendants argue that Fisher did not deprive Leroy of medical care through any intentional or reckless action and, therefore, that Fisher is entitled to qualified immunity on plaintiffs' § 1983 claim.

Under the doctrine of qualified immunity, " 'government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Boswell v. Sherburne County*, 849

F.2d 1117, 1120 (8th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "[I]n determining whether an official may prevail on his qualified immunity defense, . . . consideration [is confined] solely to the purely legal question whether 'the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions * * * .' " *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)).

In the instant case, as in *Boswell*, the § 1983 plaintiff is a pretrial detainee, not a convicted prisoner. "Pretrial detainees have not received a formal adjudication of the charges against them and as such are beyond the power of the state to punish." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 523 (1979)). Therefore, pretrial detainees receive due process protections of the fourteenth amendment, which are " 'at least as great' as those the eighth amendment affords a convicted prisoner." *Id.* at 1121 (quoting *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

The eighth amendment protects convicted prisoners from prison officials' "deliberate indifference" to their "serious medical needs." *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). As recently as *Boswell*, however, the Eighth Circuit considered the standard with regard to pretrial detainees to be an "open question": "[I]t is an open question whether the fourteenth amendment provides pretrial detainees with a greater degree of protection against denial of medical care than the *Estelle* 'deliberate indifference' standard." *Boswell*, 849 F.2d at 1121 (footnote omitted).

Quite recently, in *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993), the Eighth Circuit again noted that no standard for assessing pretrial detainees' claims of inadequate medical care had been clearly established. The court did note that "[m]ost other courts . . . have held that the deliberate indifference standard applied to pretrial detainees." *Id.* at 153 (citing *Danese v. Asman*, 875 F.2d 1239, 1243 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Whisenant v. Yuam*, 739 F.2d 160, 163 n.4 (4th Cir. 1984); *Contra, Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987) (pretrial detainees entitled to "reasonable medical care" unless the failure to supply it is reasonably related to a legitimate governmental objective)). The *Davis* court then went on to note that "[i]n the absence of a clearly established standard for pretrial detainees' claims of inadequate medical care in the Eighth Circuit," the court would apply the deliberate indifference standard.[4] *Id.*

This court feels constrained to follow *Davis* and apply the deliberate indifference standard. By any reasonable account, defendant Fisher's actions fall far short of deliberate indifference. His personal involvement with Leroy appears to be almost non-existent during the weekend of the incarceration. Therefore, any assertion that he was directly deliberately indifferent to Leroy is without merit. Any of his dealings with Leroy were through the jail staff. Nothing in the record indicates that Fisher was

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[4] The *Davis* court noted that, even under the stricter standard set forth by *Cupit* (*i.e.*, "reasonable medical care"), the plaintiff's claim would fail. *Davis*, 992 F.2d at 153.

anything other than diligent in his supervision of jail personnel. At all times during Leroy's incarceration, Fisher requested that his staff notify him of any unusual behavior on the part of any inmate. *See supra* n.2, at 2. Fisher encouraged the jailers to call him at home in the event of any problems. Jailer Daryl Berg did so at approximately 7:15 p.m. Sunday, April 15, 1990, informing Fisher of inmate Syvertson's assertion that Leroy was disoriented. At that time, Fisher apparently accepted Berg's opinion that no medical emergency existed, and instructed Berg to regularly observe Leroy for the rest of the night. Jailers Berg and Mike Chamberlain performed numerous cell checks throughout the night, and Fisher was again consulted at home at 3:30 a.m. Monday, April 16, 1990, this time by Chamberlain. Chamberlain related assertions by inmates Syvertson and Frank Harris that Leroy was hallucinating, and noted that he, Chamberlain, was unable to detect any such behavior on the part of Leroy. Fisher then accepted Chamberlain's opinion that no medical emergency existed, and again ordered that Leroy be closely watched throughout the remainder of the night. Fisher also ordered that Leroy be examined by a physician in the morning, a directive that was initiated by jailer Nola Stenerson's phone call to the Hillsboro Hospital prior to Leroy's fall at 9:25 a.m. Monday, April 16, 1990. Under these circumstances, any assertion that Fisher was acting in a manner that was deliberately indifferent to Leroy's medical needs flies in the face of reality.[5]

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[5] To foreclose any doubt in the minds of the plaintiffs, even under *Cupit's* stricter standard, plaintiffs' claim would fail.

Fisher is entitled to qualified immunity on the § 1983 claim.

Therefore, defendants' motion for summary judgment with respect to plaintiffs' § 1983 claim and request for punitive damages[6] against defendant Fisher (counts two and four of plaintiffs' complaint) is **GRANTED.**

Jurisdiction Over Pendent State Claims

This court has pendent jurisdiction over plaintiffs' state claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). For the record, the court notes that its dismissal of the § 1983 claim, which conferred federal question jurisdiction in this case, permits the court to dismiss without prejudice the pendent state claims under the doctrine of pendent jurisdiction.[7] *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972 (8th Cir. 1993). Further authority for such action is conferred by the federal supplemental jurisdiction statute: "The district courts *may* decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction. . . . " 28 U.S.C. § 1367 (emphasis added).

However, the court in its discretion will retain jurisdiction based upon interests of judicial economy and fairness. *See Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1288 (6th Cir. 1992). This case was commenced in

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[6] Incidentally, as both parties are now aware, a claim for punitive damages may not in this court be made as part of the initial pleadings. *See Nereson v. Zurich Ins. Co.*, 1992 WL 212233 (D.N.D. 1992).

[7] There is no diversity of citizenship in this action.

federal court nearly a year and a half ago. On April 29, 1993, the case was set for October 18, 1993, trial. Discovery is at or near completion and this court's file on the case has steadily grown. Remand to state court would only waste judicial resources and delay the litigation. This court was chosen by the plaintiffs, and both parties have fully briefed the court regarding the state law to be applied, thereby tacitly urging it to make the decision on the state claims. *See North Dakota v. Merchants Nat'l Bank & Trust Co.*, 634 F.2d 368, 371 (8th Cir. 1980). There have been no anticipatory motions to remand. The justification for pendent jurisdiction, "considerations of judicial economy, convenience and fairness to litigants," *Gibbs*, 383 U.S. at 726, are well served by this court's retention of jurisdiction over the state claims, and the court will now consider them upon their merits.

State Common-law Negligence Claim Against Fisher

In count three of their complaint, plaintiffs allege that the acts or omissions of defendant Fisher constituted reckless or grossly negligent conduct or willful or wanton misconduct. Further, plaintiffs state that, as a direct and proximate result of such conduct, Leroy was severely injured and is entitled to damages.

Defendant Fisher denies the allegations. In their brief in support of the motion for summary judgment, the defendants contend that the evidence does not support a finding of gross negligence, and that, as a matter of law, Fisher cannot be individually liable for any injury to plaintiffs.

N.D. Cent. Code § 32-12.1-04(3) (Supp. 1993) states the relevant law:

> No employee [of a political subdivision] may be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment unless the acts or omissions constitute reckless or grossly negligent conduct, or willful or wanton misconduct. An employee may be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment or office. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was either acting outside the scope of the employee's employment or office or the employee was acting within the scope of employment in a reckless, grossly negligent, willful, or wanton manner. . . .

Fisher was clearly acting within the scope of his employment as sheriff of Traill County at all times relevant to this lawsuit. The only question remaining with regard to Fisher's entitlement to statutory immunity on plaintiffs' claim is whether he acted in a reckless, grossly negligent, willful, or wanton manner.

"[G]ross negligence [consists] in the want of slight care and diligence." **N.D. Cent. Code** § 1-01-17 (1987). As the North Dakota Supreme Court has stated:

> Gross negligence is, to all intents and purposes, no care at all. It is the omission of the care which even the most inattentive and thoughtless seldom fail to take of their own concerns. It evinces

> a reckless temperament. It is a lack of care which is practically willful in its nature.

Bjerke v. Heartso, 183 N.W.2d 496, 501 (N.D. 1971) (internal quotations and citations omitted).

Willful or wanton negligence is more egregious yet. The North Dakota Supreme Court has characterized the test for determining when negligence becomes willful and wanton as follows:

> 'In order to characterize an injury as having been willfully or wantonly inflicted, it is necessary to show knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; ability to avoid resulting harm by ordinary care and diligence in the use of the means at hand; and the omission of such care and diligence to avert threatened danger when to an ordinary person it must be apparent that the result likely would prove disastrous to another.'

Hart v. Kern, 268 N.W.2d 136, 137 (N.D. 1978) (quoting *Van Ornum v. Otter Tail Power Co.*, 210 N.W.2d 188, 202 (1973)).

In finding that Fisher did not act with deliberate indifference to plaintiff Leroy Peterson, *supra* at 7-8, this court detailed numerous acts by Fisher that demonstrated care and consideration for the rights of Leroy. No reasonable jury could find Fisher's conduct to evince "a lack of care which is practically willful in its nature." *Bjerke*, 183 N.W.2d at 501. It follows, then, that no reasonable jury could find Fisher's conduct to be willful or wanton. Defendant Fisher has established with clarity the right to a judgment on plaintiffs' claim that his acts or omissions

constituted reckless or grossly negligent conduct or willful or wanton misconduct.

Therefore, defendants' motion for summary judgment with respect to plaintiffs' state law negligence claim against defendant Fisher is **GRANTED.**

State Common-law Negligence Claim Against Traill County

In count two of their complaint, plaintiffs allege that Sheriff Fisher and staff members of the Traill County Jail, while acting within the scope of their employment, breached a duty owed to Leroy to provide adequate medical care during his confinement. Plaintiffs allege that, as a result of the county's negligence, Leroy suffered permanent and disabling injuries; pain, discomfort and mental anguish; past and future medical expenses; and loss of productive time and impairment of earning capacity. Plaintiffs also seek in count five of their complaint to hold the county liable for a loss of consortium in Ardis Peterson.

Defendant Traill County denies the contentions of the plaintiffs. According to the defendants, plaintiffs' claim that Traill County negligently provided medical care is grounded upon the performance by county employees of discretionary functions or duties, acts which are protected by governmental immunity under **N.D. Cent. Code** § 32-12.1-03(3) (Supp. 1993). Defendants assert that because the acts of Fisher and the county jailers were discretionary, Traill County is entitled to judgment as a matter of law and plaintiffs' negligence claim should be dismissed.

Plaintiffs argue that the immunity for discretionary functions or duties does not apply to personal injury actions by virtue of the statute's plain language. Further, plaintiffs argue that even if discretionary function immunity applies to personal injury actions, Traill County cannot avail itself of the defense.

The relevant law is set forth in **N.D. Cent. Code** § 32-12.1-03(3) (Supp. 1993):

> A political subdivision is not liable for any claim based upon an act or omission of an employee of a political subdivision, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance, exercising due care, or the failure to exercise or perform a discretionary function or duty on the part of a political subdivision or its employees, whether or not the discretion involved be abused. . . .

Subsection three of the statute goes on to state, however, that "[n]othing contained in this subsection may be construed to limit the liability of a political subdivision or an employee thereof for a personal injury arising out of the execution of any legislative or quasi-legislative act, judicial or quasi-judicial act, or *discretionary function.*" *Id.* (emphasis added). Furthermore, subsection one of the same statute states as follows:

> Each political subdivision shall be liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances where the

> employee would be personally liable to a claimant in accordance with the laws of this state. . . .

Id. The statute clearly supports the plaintiffs' position that immunity for discretionary functions does not apply to personal injury actions.

Although the "personal injury exception" to governmental immunity has not been addressed directly in a reported North Dakota case, plaintiffs correctly note that it was alluded to in *Muchow v. Lindblad,* 435 N.W.2d 918 (N.D. 1989). In that case, the North Dakota Supreme Court noted that the trial court had concluded that one of plaintiffs' claims "qualified as a 'personal injury' exception to governmental immunity under Section 32-12.1-03(3), N.D.C.C." *Id.* at 920 (footnote omitted). Because the defendants did not appeal that ruling, the Supreme Court did not express an opinion on the matter. *Id.* at 920 n.2.

If the citations to statute and case law were not enough, this court's reading of *Binstock v. Fort Yates Pub. Sch. Dist.,* 463 N.W.2d 837 (N.D. 1990) satisfies the court that the personal injury exception to governmental immunity is alive and well. There the court stated as follows:

> Although chapter 32-12.1, NDCC, immunizes employees from their ordinary negligence while acting within the scope of their employment . . . it does not negate the liability of political subdivisions for injuries caused by employees acting within the scope of their employment, whether or not such acts are those of ordinary negligence or reckless or grossly

> negligent conduct, or willful or wanton misconduct. The political subdivision remains liable under the doctrine of respondeat superior. . . .

Id. at 842 (citations omitted). If, in fact, plaintiffs can prove that the actions of Sheriff Fisher or the county jailers constituted negligent conduct, that negligence may be imputed to Traill County under the doctrine of respondeat superior. Statutory immunity of political subdivisions may stand resolute in some instance, but it does not block the plaintiffs' path to the courthouse door in this case.

Neither can the court find as a matter of law that the county's employees did not act negligently. The court is extremely wary of taking from the jury the determination on ordinary negligence.[8] "Summary judgment 'should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy.' " *Vacca*, 875 F.2d at 1339 (citation omitted). "Further, '[s]ince tort actions generally encompass a multitude of factual issues and abstract concepts that become elusive when applied to varying concrete factual situations, such actions are usually not appropriate for disposition by summary judgment.' " *Umpleby v. United States*, 806 F.2d 812, 814-15 (8th Cir. 1986) (quoting *Hughes v. American Jawa, Ltd.*, 529 F.2d 21, 23 (8th Cir. 1976)). Defendant Traill County has not clearly established its right to judgment.

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[8] The court does not have the same hesitancy with regard to the negligence claim against defendant Fisher, since that claim requires a finding of gross negligence or willful or wanton misconduct.

Therefore, defendants' motion for summary judgment with respect to plaintiffs' state common-law negligence claim and plaintiff Ardis Peterson's claim for loss of consortium against Traill County is **DENIED.**

Summary and Order

Based on the foregoing memorandum of law, defendants' motion for summary judgment is **GRANTED** in part and **DENIED** in part as follows:

1. Defendants' motion for summary judgment with respect to plaintiffs' § 1983 claim and request for punitive damages against defendant Fisher (counts two and four of plaintiffs' complaint) is **GRANTED.**

2. Defendants' motion for summary judgment with respect to plaintiffs' state law negligence claim against defendant Fisher is **GRANTED.**

3. Defendants' motion for summary judgment with respect to plaintiffs' state common-law negligence claim and plaintiff Ardis Peterson's claim for loss of consortium against Traill County is **DENIED.**

IT IS SO ORDERED.

Dated this 27th day of September, 1993.

/s/ Rodney S. Webb
RODNEY S. WEBB,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 27th day of Sept 1993

EDWARD J. KLECKER, CLERK

By: /s/ Sheila M. Beauchene
Deputy

Supreme Court, U.S.
FILED
DEC. 12 1994
OFFICE OF THE CLERK

No. 94-846

In The

Supreme Court of the United States

October Term, 1994

LEROY A. PETERSON AND ARDIS PETERSON,

Petitioners,

vs.

RICHARD ALLEN FISHER AND TRAILL COUNTY, A POLITICAL SUBDIVISION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a merely negligent act can be a sufficient basis for asserting a violation of 42 U.S.C. § 1983 as it pertains to medical care claims of pretrial detainees.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS AND ORDERS BELOW 1

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 8

REASONS WHY PETITION SHOULD BE DENIED ... 9

1. Proper resolution of this case does not require a determination by this Court as to the standard for a § 1983 claim asserted by a pretrial detainee .. 9

2. The lower court's findings that Respondent Fisher's conduct did not constitute reckless, grossly negligent conduct, or willful or wanton misconduct was not based upon the "deliberate indifference" standard 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Canton v. Harris, 489 U.S. 378 (1989) 9

Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987)..... 7, 11, 12

Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989)..... 10

Daniels v. Williams, 474 U.S. 327 (1986)..... 11

Davidson v. Cannon, 474 U.S. 344 (1986) 11

Farmer v. Brennan, 114 S. Ct. 1970 (1994) 8, 9, 12

Foulks v. Cole County, 991 F. 2d 454 (8th Cir. 1993) 10

Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985)..... 11

Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985)..... 11

Jones v. Johnson, 781 F.2d 769 (9th Cir. 1986)..... 11

Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70 (1954)..... 10

Salazar v. Chicago, 940 F. 2d 233 (7th Cir. 1991)..... 10

Simpson v. Hines, 903 F.2d 400 (5th Cir. 1990)..... 11

Thomas v. Kippermann, 846 F.2d 1009 (5th Cir. 1988) 11

Wisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984)..... 11

OTHER AUTHORITY

SUP. CT. R. 10.....3, 10

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion affirming the District Court's decision in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Eighth Circuit Court of Appeals is unpublished and cited at 29 F.3d 628. This opinion is reproduced in Petitioner's Appendix (hereinafter "Pet.

App.") at Pet. App. 1 to Pet. App. 3. The Eighth Circuit Court of Appeals' order denying Petitioners' petition for rehearing is unpublished but is reproduced at Pet. App. 4. The memorandum and order by the United States District Court for the District of North Dakota is unpublished but is reproduced at Pet. App. 5 to Pet. App. 22.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Respondents agree with the Petitioners' presentation of constitutional provisions and statute pertinent to the petition for writ of certiorari. Additionally, Supreme Court Rule 10 is applicable to this matter, which states as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as

to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

SUP. CT. R. 10.

STATEMENT OF THE CASE

Petitioners have taken great liberty with their statement of the case in their petition for writ of certiorari by including misleading and immaterial facts. The actual material facts of this case have been concisely and accurately set forth in the memorandum and order by the district court. This unbiased summary of the material facts of this case, as set forth by the district court, are as follows:

On April 13, 1990, plaintiff Leroy A. Peterson ("Leroy") was brought to the Traill County

jail pursuant to a warrant of attachment for failure to pay child support. Leroy was then under the influence of alcohol and resisted arrest by Deputy Ray Weber. Following booking procedures, Leroy was placed in the county jail's detoxification cell. On Saturday, April 14, 1990, Leroy was placed in the general cell area. County jailers noticed nothing unusual in Leroy's behavior on Saturday, April 14.[1] At 2:15 p.m. on Sunday, April 15, 1990, Leroy placed a call to his home under the supervision of jailer Mike Chamberlain. At approximately 7:15 p.m. Sunday evening, inmate Chuck Syvertson reported to jailer Daryl Berg that Leroy was becoming disoriented.[2] Berg examined Leroy and satisfied himself that Leroy was aware of

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[1] Plaintiffs dispute the defendants' assertion, stating that Leroy was suffering from alcohol withdrawal symptoms and delirium tremens during the entire period of confinement, and that the defendants knew or should have known this fact, but simply failed to arrange necessary medical care.

[2] Factual disputes exist with regard to the actions of inmates who were housed at Traill County at the time of Leroy's arrest. As part of their "Statement of Material Facts Not In Dispute," defendants assert that, during the week prior to Leroy's incarceration, inmates at the jail had engaged in riot activities. Further, defendants contend that, due to a previous jail break and the inmates' riot activities of the inmates involved. The jailers were apparently instructed by Fisher to report all unusual activities of any inmate. Plaintiffs dispute the assertion that inmate Syvertson was involved in any of the riot activities and contend that Fisher's decision to delay medical treatment for Leroy was based neither on the riot activities nor the alleged jail break.

his surroundings and had his faculties about him. Nonetheless, Berg phoned Sheriff Richard Allan Fisher ("Fisher") at home to report Syvertson's statement and Berg's own opinion that no medical emergency existed. Fisher and Berg determined to keep a watchful eye on Leroy for the rest of the night.

Berg later performed cell checks at 7:30, 7:48, 8:00, 8:15, 8:40, 9:00, 9:15, 10:00, 10:15, 10:30, 11:00, and 11:30 p.m., and at 12:00 midnight,[3] noting nothing unusual in Leroy's behavior. Berg's shift ended at midnight, at which time jailer Mike Chamberlain started his shift with a midnight cell check. Chamberlain later performed cell checks at 1:00, 2:00, 2:20, 2:45, 3:10, 3:30, 4:00, 4:30, 5:00, 5:30, 6:00, 7:00, and 8:00 a.m. At the 2:20 a.m. cell check, Chamberlain noted that Leroy's hands were shaking after he requested a cigarette from Chamberlain. At this time, other prisoners had apparently reported that Leroy was disoriented, but Chamberlain's cell check did not confirm this. The 2:45 a.m. cell check revealed Leroy pacing and unable to sleep. Other inmates then reported to Chamberlain that Leroy was hallucinating. Again, Chamberlain's personal observations did not reveal this. At 3:30 a.m., inmates Syverston and Frank Harris reported that Leroy thought he was at home and was calling out for his wife; again these reports were not substantiated by Chamberlain during the cell check. Chamberlain then called Fisher at home to inform him of the

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[3] Plaintiffs note that references by defendants to cell checks at particular times are substantiated by the jail logs. However, the plaintiffs dispute some of defendants' contentions as to what occurred at those times.

> inmates' assertions regarding Leroy. Chamberlain opined that no medical emergency existed and he and Fisher agreed that Leroy should be watched closely and examined by a physician in the morning. Chamberlain performed cell checks every half hour until Leroy fell asleep between 5:00 and 5:30 a.m. Chamberlain then performed cell checks every hour until the end of his shift at 8:00 a.m. Monday, April 16, 1990.
>
> Jailer Nola Stenerson came on duty at 8:00 a.m. Monday, April 16, 1990. She phoned Hillsboro Hospital at 9:10 a.m. to set up an appointment for a physician to examine Leroy. She was informed that the physician was unavailable and that the hospital would call back at 9:30. At 9:25 a.m., Stenerson heard a loud noise and, with Chamberlain, proceeded to the cell area, where they found plaintiff lying on his back and bleeding from a head injury. An ambulance was summoned and Leroy was taken to Hillsboro and later transferred to a Fargo hospital.

[Pet. App. 6-8].

District Court Proceedings. Petitioners brought the present action against Respondents in the District Court for the District of North Dakota on June 1, 1992, alleging that under the facts of this case, Petitioner Leroy Peterson's rights were violated by Respondent Richard Allan Fisher (hereinafter "Respondent Fisher") in contravention of 42 U.S.C. § 1983; that the actions of Respondent Fisher were reckless, grossly negligent, willful or wanton, and; that Respondent Fisher and the staff members of the Traill County Jail were negligent in providing Petitioner Leroy Peterson with adequate medical care during his confinement.

Respondents made a motion for summary judgment on these claims. Upon hearing the motion for summary judgment, the district court dismissed Petitioners' § 1983 claim on the basis that Sheriff Fisher's actions fell short of the "deliberate indifference" standard utilized by the Eighth Circuit Court of Appeals and almost all other circuit courts. [Pet. App. 9-13]. The district court went on to note that Petitioners' § 1983 claim would fail even if the court were to utilize the standard previously set forth by the fifth circuit in the case of *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987) that "pretrial detainees were entitled to 'reasonable medical care' unless the failure to supply it is reasonably related to a legitimate governmental objective". [Pet. App. 11-12]. *See Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987).

Petitioners' state law claims against Respondent Fisher were also dismissed by summary judgment for the reason that no reasonable jury could find Respondent Fisher's acts or omissions to be reckless, grossly negligent, willful, or wanton. [Pet. App. 14-17]. However, the district court denied Respondent's motion for summary judgment against the state common-law negligence claims asserted against Traill County because there was a jury question as to whether the actions of Respondent Fisher or the Traill County jailers constituted negligent conduct which could be imputed to Traill County under the doctrine of respondeat superior. [Pet. App. 17-21].

Court of Appeals Proceedings. Upon appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment "for the reasons stated in the District Court's Memorandum and Order dated September 27, 1993." [Pet. App. 1-3]. This decision

by the Eighth Circuit Court of Appeals was *per curiam.* The court of appeals also noted that "summary judgment in this case is consistent with the Supreme Court's recent pronouncement" in *Farmer v. Brennan* that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Quoting Farmer v. Brennan,* 114 S. Ct. 1970, 1979 (1994). Petitioners requested a rehearing with suggestion for rehearing *en banc.* Petitioners' request for rehearing was summarily denied. [Pet. App. 4].

SUMMARY OF THE ARGUMENT

Upon review of all undisputed material facts, the district court and the court of appeals determined as a matter of law that Respondent Fisher's actions with regard to the treatment of pretrial detainee Leroy Peterson were not deliberately indifferent, reckless, grossly negligent, willful or wanton. The only unresolved question was whether such actions could be deemed to be negligent. This Court has determined on prior occasions that merely negligent acts are insufficient to cause a deprivation of due process rights under the fourteenth amendment.

Therefore, in light of the facts of this case, it is not necessary for this Court to determine at this time whether the standard for a § 1983 action involving medical care claims of pretrial detainees is that of "deliberate indifference," as defined in the recent Supreme Court case of

Farmer v. Brennan, or some lesser standard, which necessarily exceeds that of negligence.

Further, no other reasons exist which demonstrate that the court should exercise its judicial discretion and grant the petition for writ of certiorari.

REASONS WHY PETITION SHOULD BE DENIED

1. Proper resolution of this case does not require a determination by this Court as to the standard for a § 1983 claim asserted by a pretrial detainee.

Petitioners primary basis for requesting that this Court grant their petition for writ of certiorari is that the standard of "deliberate indifference" was utilized by the district court and the court of appeals in determining whether or not Petitioners had a valid § 1983 claim. It is Petitioners' contention that this standard only applies to convicted prisoners and not pretrial detainees such as Petitioner Leroy Peterson. Petitioners therefore are requesting that this Court grant their petition for writ of certiorari to define the standard to be utilized in a § 1983 action relative to medical care claims of pretrial detainees.

However, such determination by this Court is not necessary for the proper resolution of this case and therefore Petitioner's petition for writ of certiorari should be denied. *See Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989) (Supreme Court did not need to determine the culpability requirement for "a denial of the due process right to medical care while in detention" because the case could

be resolved on other grounds). Pursuant to Rule 10 of the Superior Court Rules, review on writ of certiorari is purely a matter of discretion by this Court. *See* SUP. CT. R. 10. Only if there are "special and important reasons" will a petition for writ of certiorari be granted. *Id.* Because this case can be properly resolved without the need for this Court to enunciate the standard for medical care claims of pre-trial detainees, any discussion of such applicable standard would be academic in nature. Issues which are merely academic are not "special and important reasons" as set forth in Rule 10 of the Supreme Court Rules. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1954). It was held by the district court that Respondent Fisher did not act deliberately indifferent, recklessly, grossly negligent, willfully or wantonly in his actions toward Petitioner Leroy Peterson as a pretrial detainee. The only unresolved question was whether Respondent Fisher or other county employees acted *negligently* in their treatment of him. Upon careful review, the court of appeals unanimously held that, based upon the undisputed material facts of the case, the district court properly granted Respondents' motion for summary judgment.

In effect, the district court and the court of appeals found that Respondent Fisher's actions or inaction towards Petitioner Leroy Peterson could, at *most*, be considered mere *common law negligence*. It is virtually unanimous among the circuit courts that mere negligence is not sufficient to satisfy a claim based upon an alleged violation of due process under the fourteenth amendment. *See Foulks v. Cole County*, 991 F. 2d 454, 457 (8th Cir. 1993); *Salazar v. Chicago*, 940 F. 2d 233, 238 (7th Cir. 1991); *Danese*

v. Asman, 875 F.2d 1239, 1243 (6th Cir. 1989); *Wisenant v. Yuam*, 739 F.2d 160, 163 n.4 (4th Cir. 1984); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Hamm v. DeKalb County*, 774 F.2d 1567, 1571-72 (11th Cir. 1985). These courts have essentially held that only intentional or criminally reckless conduct can violate the due process clause of the fourteenth amendment. *Id.* Such opinions are consistent with the rulings by this Court that merely negligent acts are not sufficient to cause a deprivation of due process. *See Daniels v. Williams*, 474 U.S. 327, 332-33 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986).

The only circuit which could have *arguably* adopted a standard by which a deprivation of due process could be satisfied with a showing of mere negligence is in the fifth circuit. In the case of *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987), the Fifth Circuit Court of Appeals held that a "reasonable medical care" standard applied in determining due process violations for pre-trial detainees. *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987). To the extent that the fifth circuit's "reasonableness" standard suggests a simple negligence standard, it clearly contravenes Supreme Court authority. In applying the *Cupit* standard, the fifth circuit has not attempted to reconcile it with the *Daniels v. Williams* and *Davidson v. Cannon* decisions. However, several more recent fifth circuit cases appear to have applied a culpability requirement greater than that of negligence. *See, e.g., Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988) (allegation of deliberate denial of medical care implicating more than negligence); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (record established at least a callous indifference to a known medical condition). In the

present case, the district court noted that even under the *Cupit v. Jones* standard, Petitioners' § 1983 claim would fail.

The undisputed material facts of this case clearly show that Respondent Fisher's actions or inaction towards Petitioner Leroy Peterson were, at most, negligent. Because negligence is not a sufficient basis for alleging a violation of due process under § 1983, Petitioners have no such cause of action against Respondent Fisher. Therefore, it is unnecessary for the Court to determine at this time whether the "deliberate indifference" standard, as defined in *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), is applicable or whether some lessor standard (exceeding a negligence standard) applies when the claims of due process violations involve the medical care of pretrial detainees. Therefore, Petitioners' writ for certiorari should be denied.

2. The lower court's findings that Respondent Fisher's conduct did not constitute reckless, grossly negligent conduct, or willful or wanton misconduct was not based upon the "deliberate indifference" standard.

Petitioners assert in their petition for writ of certiorari that the district court and the court of appeals implicitly found that unless a "deliberate indifference" standard was met, the standards of recklessness, gross negligence, and willful and wanton misconduct could not be met. This is a completely inaccurate assertion.

The district court discussed in extensive detail why it found that there was a complete absence of recklessness,

gross negligence and willful and wanton misconduct by Respondent Fisher. There was no suggestion whatsoever that this particular holding depended upon the determination that Respondent did not act with deliberate indifference. The only correlation between these separate determinations was the factual analysis of Respondent Fisher's conduct. The court of appeals likewise reviewed the undisputed material facts and affirmed the granting of Respondent Fisher's motion for summary judgment based upon the reasons set forth in the memorandum and order by the district court.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Dated this 12th day of December, 1994.

Respectfully submitted,

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